

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

The Finley Hospital,

Petitioner,

v.

National Labor Relations Board,

Respondent,

and

Service Employees International Union, Local 199,

Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the
National Labor Relations Board

**REPLY IN SUPPORT OF PETITION FOR REHEARING OR
REHEARING EN BANC**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. This Case Is Not About a “Single Raise on a Single Date,” and the Cases Finley Cites for Its “Single Raise” Argument Are Inapposite.	1
II. The Panel Decision Creates Inter-Circuit Conflict.....	4
III. The Panel Decision Conflicts with <i>Katz</i>	8
CONCLUSION	10
CERTIFICATE OF VIRUS CHECK	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

CASES	PAGE
<i>AlliedSignal Aerospace</i> , 330 N.L.R.B. 1216 (2000)	6
<i>Am. Mirror Co.</i> , 269 N.L.R.B. 1091 (1984).....	3
<i>Bryant & Stratton Bus. Inst., Inc. v. NLRB</i> , 140 F.3d 169 (2d Cir. 1998).....	9–10
<i>Covanta Energy Corp.</i> , 356 N.L.R.B. 706 (2011).....	9
<i>Daily News of L.A. v. NLRB</i> , 73 F.3d 406 (D.C. Cir. 1996).....	10
<i>Derrico v. Sheehan Emergency Hosp.</i> , 844 F.2d 22 (2d Cir. 1988).....	3
<i>E.I. DuPont de Nemours</i> , 364 N.L.R.B. No. 113, 2016 NLRB LEXIS 661 (Aug. 26, 2016).....	3, 6
<i>Hinson v. NLRB</i> , 428 F.2d 133 (8th Cir. 1970)	3
<i>Honeywell Int’l, Inc. v. NLRB</i> , 253 F.3d 125 (D.C. Cir. 2001)	5, 6, 7
<i>Intermountain Rural Elec. Ass’n v. NLRB</i> , 984 F.2d 1562 (10th Cir. 1993)	10
<i>Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.</i> , 484 U.S. 539 (1988).....	3, 6, 8
<i>Lincoln Lutheran of Racine</i> , 204 L.R.R.M. 1234, 2015 NLRB LEXIS 674 (Aug. 27, 2015).....	5–6, 7
<i>Local Joint Exec. Bd. of Las Vegas v. NLRB</i> , 309 F.3d 578 (9th Cir. 2002)	8
<i>Local Joint Exec. Bd. of Las Vegas v. NLRB</i> , 540 F.3d 1072 (9th Cir. 2008)	4, 5, 7, 8
<i>NLRB v. Gen. Tire & Rubber Co.</i> , 795 F.2d 585 (6th Cir. 1986).....	5, 7
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	2, 6, 8

<i>S. Md. Hosp. Ctr. v. NLRB</i> , 801 F.2d 666 (4th Cir. 1986).....	2
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943)	9
<i>Wilkes-Barre Gen. Hosp.</i> , 203 L.R.R.M. 2040, 2015 NLRB LEXIS 537 (July 14, 2015)	3, 5

Finley Hospital (“Finley” or “Hospital”) consistently gave nurses annual raises for more than nine years and then codified its annual-raise practice in a nurses’ collective bargaining agreement (“CBA”). Under that CBA, Finley gave nurses raises for a tenth consecutive year, awarding wage increases on many different days throughout the year as each nurse’s anniversary date arrived. The panel majority reached the counter-intuitive conclusion that *stopping* this ten-year raise practice continued the status quo only because it made errors of law and fact that create inter-circuit and Supreme Court conflicts. Finley’s response brief doubles down on those errors and strengthens the case for rehearing.

ARGUMENT

I. This Case Is Not About a “Single Raise on a Single Date,” and the Cases Finley Cites for Its “Single Raise” Argument Are Inapposite.

Finley’s first argument is that the panel majority’s status-quo holding would be correct if this were an entirely different case—one involving a “single raise on a single date.” Resp. 3. But this case involves nothing of the kind: In the parties’ contract year alone, the CBA required Finley to grant multiple raises on multiple days as each nurse’s anniversary date arrived. JA 276. Many raises on many dates are not a “single raise on a single date,” and Finley’s argument about what might be permissible in a “single raise” scenario is irrelevant to the case actually presented to the panel. *Contra* Op. 6–7; Resp. 3.

Indeed, on this issue the facts are materially indistinguishable from those in *NLRB v. Katz*, 369 U.S. 736 (1962). The *Katz* employer committed to its sick-leave policy on one date, *id.* at 744, just as Finley committed to its contractual raise provision on the day it signed the CBA. Then the employers in both cases applied their policies on different dates throughout the following months as the policies became relevant to individual employees, *i.e.*, on sick days for *Katz* employees and on anniversary dates for Finley nurses. *See id.* at 744; JA 276. Finley no more paid a “single raise on a single date” than the *Katz* employer paid for a “single sick day on a single date.” Yet the panel majority permitted Finley unilaterally to change its practice, in sharp contrast to the Supreme Court’s holding in *Katz*. *See* 369 U.S. at 744 (prohibiting employer sick-leave changes).

In addition to being factually incorrect, Finley’s “single raise” argument rests on inapposite case law about employer changes made in the absence of a contract. Resp. 4–5. If an employer makes a policy change before the parties have reached agreement on a CBA, that change violates the National Labor Relations Act (“NLRA”) only if the employer’s prior practice was consistent and long-standing enough to establish a status quo. *See, e.g., S. Md. Hosp. Ctr. v. NLRB*, 801 F.2d 666, 669–70 (4th Cir. 1986). A court considering such a case must conduct a fact-intensive inquiry into the employer’s past practice, *see id.*, and even

multiple past raises might not demonstrate a prior status quo depending on the case's specific facts. *See, e.g., Am. Mirror Co.*, 269 N.L.R.B. 1091 (1984).

When parties have had a CBA, the analysis is different. The parties' expired agreement "quite obviously define[s]" the status quo ante, so courts do not conduct any fact-intensive inquiry into the employer's past-practice. *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970); *see also, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26 (2d Cir. 1988). Cases about whether past practice established a status quo are thus beside the point when parties have an expired CBA, as this Court has pointedly explained. *See Hinson*, 428 F.2d at 139 (earlier Second Circuit case "clearly distinguishable" because in that case "the Company had never entered into a written collective bargaining agreement" that set the status quo) (internal quotation marks omitted); *see also Wilkes-Barre Gen. Hosp.*, 203 L.R.R.M. 2040, 2015 NLRB LEXIS 537, at *24 (July 14, 2015) (distinguishing *Am. Mirror* because in that case "there had been no contract"). *Cf. E.I. DuPont de Nemours*, 364 N.L.R.B. No. 113, 2016 NLRB LEXIS 661, at *44 n.28 (Aug. 26, 2016) (describing this case, *Finley Hospital*, as "not involv[ing] the Board's past practice doctrine[.]"). *Contra* Resp. 4–5 (relying on no-contract cases); Op. 7 (same).

In sum, this case does not involve a single past raise on a single date and, even if it did, past-practice evidence could not change the CBA-set status quo. Finley’s inaccurate description of the facts and reliance on inapposite case law mirror errors made by the panel majority and militate in favor of rehearing.

II. The Panel Decision Creates Inter-Circuit Conflict.

Finley’s next argument—that other circuits’ cases are distinguishable because they interpret CBAs as part of a “waiver” analysis or involve slightly different facts—fails for three reasons: (1) there is clear conflict with the other cases’ contract interpretation, notwithstanding that some interpret CBAs as part of a “waiver” analysis; (2) the panel majority’s rejection of “waiver” analysis is an additional error that puts this Court at odds with others, not a reason to deny the petition; and (3) the other circuits’ cases are not factually distinguishable.

First, there is clear conflict among the circuits. In *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008), for example, the court considered the very same question presented here, namely, whether “the parties intended that [a contract obligation] would not survive expiration of the agreement.” *Id.* at 1077. The court reviewed the Board’s contract interpretation *de novo*, 540 F.3d at 1078, as the panel did here, Op. 5. And the court looked at language virtually identical to the language at issue in this case and held that it “says nothing about what happens after the agreement expires” and “does not state

that [the obligation] will terminate on expiration of the Agreements.” *Id.* at 1080. *Contra* Op. 7. The “waiver” standard made no difference, *see* 540 F.3d at 1080, and the conflict between the two courts’ holdings is clear. *Compare, e.g., Local Joint Exec. Bd.*, 540 F.3d at 1077, 1080 (language did not “explicitly” limit obligation to CBA term), *with, e.g., Op. 7* (same language “explicitly” limited obligation to CBA term).¹

Second, the panel majority’s treating this case as about status quo rather than waiver is itself error that warrants rehearing, not a reason to allow the majority decision to stand. As Finley notes, the Board and other circuits examine contract durational language to determine whether it amounts to a “clear and unmistakable” waiver of the statutory prohibition against unilateral changes. Unlike the panel majority, they do *not* treat ordinary durational language as affecting their determination of the status quo. *See, e.g., Local Joint Exec. Bd.*, 540 F.3d at 1080; *Honeywell*, 253 F.3d at 132–34; *Wilkes-Barre Gen. Hosp.*, 2015 NLRB LEXIS 537, at *20–21; *Lincoln Lutheran of Racine*, 204 L.R.R.M. 1234, 2015 NLRB

¹ *Cf. also Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 132–33 (D.C. Cir. 2001) (durational language did “not say that [obligations] are terminated at the expiration of the agreement”); *NLRB v. Gen. Tire & Rubber Co.*, 795 F.2d 585, 588 (6th Cir. 1986) (durational language “silent” as to period after stated term).

Finley is flatly wrong when it says *Honeywell* addresses only waiver. Resp. 8. The employer made two arguments in that case: (1) that the parties “expressly agreed” that the employer’s obligation would end at expiration, *cf.* Op. 7; and (2) that the union “waived” its members’ right to post-expiration benefits. *Honeywell*, 253 F.3d at 132. The holding just cited pertains to the employer’s first argument, *not* the court’s waiver analysis. *Id.* at 132–34.

LEXIS 674, at *30 n.23 (Aug. 27, 2015); *AlliedSignal Aerospace*, 330 N.L.R.B. 1216, 1216 (2000) (affirmed in *Honeywell*); JA 276–79.

The Board and other circuits’ approach is the correct one: The NLRA requires parties with an expired contract to maintain the “status quo ante,” *Laborers Health*, 484 U.S. at 544 n.6, *i.e.*, the status quo “existing on the expiration date of the parties’ [CBA],” *E.I. DuPont*, 2016 NLRB LEXIS 661, at *18. Any substantive provisions that applied “during the term of [the] Agreement,” JA 276, are part of that status quo because they were in effect on the contract’s last day; such terms continue to apply as they did before the CBA expired. *See Local Joint Exec. Bd.* & other cases cited *supra*. Indeed, since all contract provisions usually apply during the term of the agreement but not after, there would be no status quo to speak of if provisions that applied only “during the term of this Agreement” were excluded. *See Honeywell*, 253 F.3d at 133 (“[T]he *Katz* rule often presupposes the end of a [CBA] We would effectively drain the unilateral change doctrine of any coherent meaning were we to hold that a general contract duration clause . . . vitiates a Union’s statutory claim . . .”).

Given that ordinary durational language like “during the term of this Agreement” is entirely consistent with a provision’s being *part* of the statutory status quo, the Board and courts have logically required something more if parties want to avoid complying with a contract provision during negotiations: Parties

must use language in their agreement that “clearly and unmistakably” waives application of the no-unilateral-change rule. *Local Joint Exec. Bd.*, 540 F.3d at 1082; *see also id.* at 1079–80 (“Therefore, . . . the Board has, in decisions too numerous to cite . . . applied the clear and unmistakable waiver analysis to *all* cases . . . where an employer has asserted that a [contractual] provision authorizes it to act unilaterally[.]”) (emphasis added); *Gen. Tire & Rubber*, 795 F.2d at 588; *Lincoln Lutheran*, 2015 NLRB LEXIS 674, at *30 n.23. By rejecting this settled and well-supported waiver analysis, and instead treating ordinary durational language as if it affected the status quo, the panel majority erred as a matter of law and put this Court at odds with others.

Finally, the cases Intervenor cited are not factually distinguishable on the basis of past practice. *Contra* Resp. 6–8. Neither the Ninth Circuit nor the D.C. Circuit nor the Sixth Circuit relied in any way on past practice when holding that the employers before them had to maintain the pre-expiration status quo. *See Local Joint Exec. Bd.*, 540 F.3d at 1078–82; *Honeywell*, 253 F.3d at 132–33; *Gen. Tire & Rubber*, 795 F.2d at 587–88 (rejecting employer argument about past practice). Because all three relied on contract language, not past practice, their slightly different facts regarding past practice do not distinguish their holdings.²

² Finley mischaracterizes *Local Joint Executive Board*. The Ninth Circuit did not say that the parties had an identical dues-check-off provision for thirty years, only that the most recent CBAs were substantially identical for the two

III. The Panel Decision Conflicts with *Katz*.

Katz involves an employer policy similar in application to the policy at issue here, in effect for less time than Finley's, with which the Supreme Court required an employer to continue to comply. *Contra* Op. 6–8. Finley's various attempts to show consistency with *Katz* are without merit.

Finley's claim that *Katz* "compelled" it to stop paying raises is entirely unsupported. Finley's raises were non-discretionary, pre-defined increases that the Hospital had committed to providing on nurses' anniversary dates—precisely the kind of "automatic increases to which the employer had already committed" that *Katz* allows. *See* 369 U.S. at 746. Finley's continuing expected raises would have been in line with its "long-standing practice" as well. *See id.* And, in any event, the Supreme Court's *Laborers Health* decision makes clear that employers may also (indeed, must) continue raises that would have been provided under "an expired collective-bargaining agreement," 484 U.S. at 544 n.6, as is true here.

Finley's next *Katz* argument—that the Hospital acted consistently with the Supreme Court's decision because stopping raises fulfilled employee expectations—crosses into the absurd. If Finley's nurses had expected an end to raises, Finley would not have had to notify them of the change in its practice. Yet

employers involved. *See* 540 F.3d at 1075–76; *see also Local Joint Exec. Bd. of Las Vegas v. NLRB*, 309 F.3d 578, 580 (9th Cir. 2002) (prior opinion). The court did not mention earlier dues check-off practice, presumably because it was irrelevant.

Finley did send a letter effectively informing nurses that their situation was changing for the worse because they had exercised their right to form a union and were continuing to exercise their right to bargain. JA 327 (in Pet. Ex. C). This is “precisely the message” the NLRA prohibits. *Covanta Energy Corp.*, 356 N.L.R.B. 706, 710–11, 714–16 (2011).³

Finley’s last argument is that because adhering to its obligations would have resulted in higher pay for nurses post-contract, the Hospital could not give the raises nurses expected. Resp. 10. But that same fact is present in every case where an expired CBA dictates a periodic increase, and yet the Board and courts routinely require employers to continue wage-increase and bonus programs that result in higher pay post-contract. *See, e.g., Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140

³ Finley’s employee-expectations argument is particularly absurd in light of the Hospital’s ten-year raise history, *see* Pet. Ex. B, and Finley’s arguments for ignoring that informative (albeit supererogatory) history are unpersuasive.

Courts ordinarily judge an agency decision on the grounds the agency relied on as a form of deference, *i.e.*, to avoid deciding questions that the agency should consider first. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (source of the rule Finley cites). But what happened here is the opposite of what *Chenery* intends: After the Board applied its settled waiver analysis, JA 276–79, the panel majority set that analysis aside and decided the case on an entirely different ground, status quo. Op. 6–8. In so doing, the majority moved beyond the grounds on which the Board relied, *contra Chenery*, 318 U.S. at 88, and also made past practice newly relevant as the only remaining basis on which the Board might prevail. The majority then compounded its error by failing either to consider the Board’s past-practice evidence or to remand to the Board to assess that newly relevant evidence according to the majority’s test. *See id.* 7–8. *But see Chenery*, 318 U.S. at 95 (remanding to the agency for further proceedings).

Allowing that “gotcha” approach to stand would turn *Chenery* on its head.

F.3d 169, 178–81 (2d Cir. 1998) (annual wage increases); *Daily News of L.A. v. NLRB*, 73 F.3d 406 (D.C. Cir. 1996) (same); *cf. Intermountain Rural Elec. Ass’n v. NLRB*, 984 F.2d 1562 (10th Cir. 1993) (increased benefit payments).

CONCLUSION

For the foregoing reasons, rehearing should be granted.

Dated: October 11, 2016

Respectfully submitted,

s/ Claire Prestel

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CERTIFICATE OF VIRUS CHECK

Pursuant to 8th Cir. R. 28A(h)(2), I hereby certify that the electronic version of the foregoing document have been scanned for viruses and are virus-free.

Dated: October 11, 2016

s/ Claire Prestel

Claire Prestel

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Claire Prestel
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